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IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 665

LUCILLE SCHUCKMAN,

Petitioner,

vs.

LAWRENCE J. RUBENSTEIN, HARVEY T. GRACELY, MAYNARD E. MONTROSE, J. MALCOLM STRELITZ and MARION POWER SHOVEL COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SIXTH CIRCUIT AND SUPPORTING BRIEF

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STATUTES, ETC.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Sixth Circuit, to review the judgment and order of that Court, modifying and affirming the judgment and order of dismissal, on defendant's motion before answer, made by the United States District Court for the Northern District of Ohio, Western Division.

Jurisdiction

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

December 12, 1947, the United States Circuit Court of Appeals for the Sixth Circuit, modified and affirmed the judgment of the United States District Court for the Northern District of Ohio, entered May 7, 1947.

Federal jurisdiction rests on diversity of citizenship and the amount in controversy.

Summary Statement of the Case

The complaint states two claims. The supplemental complaint states a third claim, setting forth transactions, occurrences and events which have happened since the complaint was filed.

The petitioner and plaintiff below is a substantial preferred stockholder of the corporation respondent of which the individuals respondent are directors.

The first claim is against the respondents Rubenstein, Gracely, Montrose, and Strelitz, as directors, to compel them to vote for the declaration and payment of cash dividends on the corporation respondent's preferred stock. When this action was begun on January 3, 1947, dividends had not been declared or paid in cash for 64 quarters from October 1, 1930. During that period, the corporation had surplus profits and earnings available to pay in cash, the $113.75 arrears on each such share of preferred stock, but the directors, fraudulently, wrongfully and in bad faith, diverted the surplus earnings and profits to enhance the value of the common stock owned or controlled by the corporation's directors. The directors are citizen residents of several states, so that there is no Court with venue jurisdiction over a majority of all of the directors in a single

suit. Judgment is here sought by plaintiff-petitioner against those directors properly before the District Court, and no others. As to the remaining directors, some of whom have been named as defendants, similar suits will be brought in other Federal Courts as to whom venue will be proper. The cumulative effect of the number of suits and judgments would result in the declaration and payment of cash dividends by a majority of all of the directors.

The second claim is against the corporation, for dividends payable in common stock, in an amount equal to the dividend arrears on the 17,778½ shares of preferred stock outstanding. The corporation is authorized, by statute, to declare dividends payable in shares. The corporation issued its common stock and took up 13,219½ shares of preferred stock with the accumulated dividend arrears. It then retired those preferred shares so acquired with the dividend arrears. The corporation withheld and refused to pay in common stock, in an amount equal to the arrears, the dividends accrued upon the 17,778½ remaining shares of preferred stock, including that of petitioner.

The supplemental complaint challenges a capital restatement which takes away the security behind the outstanding preferred stock and would pay the dividend arrears from such security.

Before answer to the complaint, respondents moved on affidavits (13-16*):

1. To dismiss the action because there is no diversity of citizenship between plaintiff and defendants.

2. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

3. To dismiss the action because the Court lacks jurisdiction over the persons of the defendants in an action of this type.

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* All number references are to pages in the record.

While defendants' motions were sub judicia, plaintiff-petitioner moved for leave to serve a supplemental complaint.

The District Court granted defendants' motion on grounds "2" and "3" (supra) and denied plaintiff's motion (23).

The Circuit Court affirmed (29), stating the ruling of the District Court "should be sustained also on the first ground stated in the motion" (31).

Questions Involved

1. In a stockholder's action against a director for his misconduct, seeking a judgment limited to the director-defendant properly before the Court, did the Court err in holding, that a majority of all of the directors must be joined as defendants in a single suit, in order for the Court to entertain jurisdiction and to proceed to trial and to adjudication of the suit between the parties properly before the Court?

2. In a stockholder's action against a director for his misconduct, seeking a judgment limited to the director-defendant properly before the Court, did the Court err in holding, that federal diversity jurisdiction of parties properly before the Court is defeated because a director named as a defendant, against whom no relief is sought in that action, who has not appeared, and who has not been served with either the summons or complaint, is said to be a citizen resident of the same state as plaintiff?

3. Does a complaint, with two claims, state a claim against a corporation, for common stock, in an amount equal to the dividend arrears on preferred stock, in favor of preferred shareholders, wh[illegible] is alleged: that the corporation was authorized b[illegible] declare dividends payable in shares; that to take up [illegible] 19½ shares of such

preferred stock, with dividend arrears thereon from 1930 to 1946, the corporation issued common stock; that the corporation then retired such 13,219½ shares of preferred stock with such dividend arrears; that such preferred stock dividends so declared payable in common stock was not paid to the remaining holders of the same class of preferred stock including the plaintiff?

4. Did the Courts below err in refusing to permit petitioner her right under Rule 15(d), F. R. C. P., to serve a supplemental pleading setting forth transactions and occurrences which happened since the filing of petitioner's complaint?

Reasons for the Allowance of the Writ

1. The Court decided a question of law of substantial importance in the administration of justice and the Judicial Code (28 U. S. C. A. 111, and 112 as amended), to wit:

> Is a stockholder to be denied a forum to proceed against his corporation and derelict directors, for the reason that he is unable to join a majority of all the directors of the corporation as defendants in a single suit, because the directors are citizen residents of several states so that there is no tribunal with jurisdiction over a majority of them in a single action?

2. The decision below is contrary to well established law, in the holding below that, federal diversity jurisdiction of parties properly before the Court is defeated because one against whom no relief is instantly sought, who has not been served and has not appeared and has been named as a defendant turns out to be a citizen resident of the same state as plaintiff.

3. The decision below that federal diversity jurisdiction is determined by the citizenship and residence of proper or nominal parties, as distinguished from indispensable

and necessary parties, is contrary to well established law.

The decision of the Circuit Court of Appeals for the Sixth Circuit (the Circuit Court below) is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Galdi* v. *Jones,* 141 Fed. (2) 984. The Second Circuit decided that federal diversity jurisdiction in a stockholder's action against directors, was not defeated because plaintiff, a citizen resident of New York, named as a defendant, a director citizen resident of New York, against whom the complaint disclaimed a personal judgment, as in this case.

4. The answers to the questions presented have far-reaching importance on the jurisdiction of the Federal Courts, the federal rules of civil procedure, on the conduct of corporate directors and other fiduciaries and in corporation law.

Conclusion

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit to review the order and judgment of that Court in the above cause; and that said order and judgment be reversed; that petitioner be granted the relief sought by petitioner in this cause and such further relief as may seem proper.

Respectfully submitted,

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LAWRENCE J. RUBENSTEIN, HARVEY T. GRACELY, MAYNARD E. MONTROSE, J. MALCOLM STRELITZ and MARION POWER SHOVEL COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION

Jurisdiction

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

December 12, 1947, the United States Circuit Court of Appeals for the Sixth Circuit, modified and affirmed the judgment of the United States District Court for the Northern District of Ohio, entered May 7, 1947.

Federal jurisdiction rests on diversity of citizenship and the amount in controversy.

Opinions Below

The Circuit Court's opinion is reported at 164 Fed. (2) 952, and is found in the record at pages 30-39 inclusive.

The District Court's opinion is unreported and is found in the record at pages 22 and 23.

Statutes Involved

Judicial Code, Section 50 (28 U. S. C. A. 111):

> "Where there are several defendants in any suit at law or in Equity, and one or more of them are neither inhabitants of nor found within the district in which suit is brought, and do not voluntarily appear, the Court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before t * * *."

Section 51, Judicial Code (28 U. S. C. A. 112):

> "Except as otherwise provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by an original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; except that suit by a stockholder on behalf of the corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found." 1936 U. S. Statutes at Large, Chap. 200.

The Facts

This action for dividends is not the usual action for cash dividends sought by common stockholders, who challenge the discretion of directors seected by them. Petitioner is a preferred stockholder. In 1946, when the preferred stock dividend arrears had accumulated for sixteen years, these

dividend arrears were paid in common stock to some preferred stockholders, but not to others. Petitioner and other preferred stockholders were not paid.

The respondent corporation has outstanding 7% cumulative preferred stock and common stock.

The respondent corporation's net earnings per share of preferred stock and net income for each of the years ending December 31st is as follows (6):

Year	*Approximate net income*	*Earnings per share preferred stock*
1945	$284,398	$10.76
1944	490,471	18.55
1943	466,952	17.64
1942	610,378	28.09
1941	539,963	20.42
1940	508,603	19.42
1939	102,966	3.89

Respondent's motions admit the allegations in the complaint:

> "19. During said periods there have been and still are surplus profits to pay said unpaid accumulated dividends * * * but the company's directors unreasonably and wrongfully refuse to pay dividends on the preferred stock" (6).

This suit followed the refusal to pay the dividend arrears (10).

Petitioner challenges the directors' conduct as oppressive to the preferred stockholders, and in bad faith for the benefit of the common stock.

Upon this claim petitioner is entitled to a judgment for cash dividends, unpaid, after demand (10).

As an Ohio corporation the defendant corporation is authorized to "declare dividends payable in * * * shares" (Ohio Corp. Act, Sec. 8623-38).[1]

[1] See footnote 8.

To take up the 13,219½ shares of preferred shares, with the dividend arrears from 1930 to June, 1946, retired in June, 1946, the corporation issued common stock in exchange (7). This required the payment of the preferred stock dividend arrears payable in common stock. Such dividend payment was limited to those preferred stockholders who compromised the dividend arrears. The holders of the remaining 17,788½ shares of preferred, like petitioner, who would not compromise, were not paid. Petitioner's second claim is against the respondent corporation to recover the dividend arrears payable in common stock in an amount equal to the arrears.

As a consequence of taking up the 13,219½ shares of preferred, the common stock then outstanding increased in value about $10.90 for each such share of common stock (Standard & Poor Corp. Rec., 1946, p. 30).

Also for the benefit of the common stock the corporation's $1,145,000 bond issue was retired by prepayment at 101 of par on April 1, 1945 (7).

October 2, 1946, the corporation respondent stated, inter alia (7):

> "To the Preferred and Common Shareholders of Marion Power Shovel Company: * * * The management is now prepared, with the cooperation of all shareholders, to carry out its further plans for the retirement of the 7% Preferred stock and the dividend arrearages thereon. The Company is asking the Preferred and Common shareholders to vote upon a proposed amendment to the Articles of Incorporation authorizing 15,000 shares of 4½% Prior Preferred stock ($100 par value). Upon authorization by the shareholders of the new Prior Preferred stock, a formal offer will be made to exchange on a voluntary basis each share of 7% Preferred into one share of 4½% Prior Preferred, plus not less than 6 nor more than 8 shares of Common stock as may be determined by the directors at the time of the offering."

October 2, 1946, respondents solicited from the preferred shareholders their proxy to vote in favor of said charter

amendment at a special meeting of the shareholders to be held on November 7, 1946 (8).

The October 2, 1946 solicitation for proxies did not disclose to the preferred shareholders that if any of them objected to such amendment the Ohio General Corporation Act gave to such objector the right to dissent and appraisal of their preferred stock with accumulated unpaid dividends thereon and to payment of the fair cash value as provided by the Ohio General Corporation Act (9). On the contrary, the solicitation falsely led the preferred shareholders to believe that the so-called "exchange on a voluntary basis" would not alter the position of those preferred shareholders who declined the "exchange on a voluntary basis" (7). Actually, the scheme is compulsory. One who does not assent is deprived of payment under the statute.

The October 2, 1946 copy of the proposed charter amendment accompanying respondents' proxy solicitation omitted from such proposed amendment the paragraph regarding the rights of the holders of the preferred stock and the common stock on liquidation or dissolution (9). On that respondents received preferred stock proxies (9). Thereafter, on October 26, 1946, respondents sent to the shareholders a corrected copy of the proposed amendment to the articles of incorporation to create a new preferred stock (9).

Petitioner and other preferred stockholders, acting through counsel, attended the special meeting on November 7, 1946, indicating opposition (9). Respondents adjourned that meeting to December 12, 1946, without any discussion, except to record the vote on respondents' motion to so adjourn, including the objections of petitioner's counsel to such adjournment (10).

November 27, 1946, respondents stated, inter alia (10):

> "To the Shareholders of Marion Power Shovel Company.
>
> The response from the Common stockholders in favor of the proposed amendment was in excess of the two-thirds required vote. However, the response from

the preferred stockholders to date has not been sufficent to give the required vote in favor of the proposed amendment.

Furthermore, dissenting stockholders, individually and through counsel, have indicated that they will resort to legal proceedings to obtain from the company the fair cash value of their shares in the event the proposed amendment is approved. Your directors are not disposed to subject the company to litigation or the possible depletion of its cash reserves. Therefore, the meeting called for December 12, 1946 will not be held."

After this action was commenced and on January 6, 1947, respondents caused $1.75 to be paid on January 27, 1947 on each share of said preferred stock (20).

While respondents' motions to dismiss were sub judicia before the Court below, and under date of March 1, 1947, petitioner and the other stockholders received notice of the statutory annual meeting to be held on April 7, 1947 (19). It stated that, among others, the purpose of that meeting was:

"(4) Acting upon a proposal to reduce the stated capital of the Corporation from $5,011,186.05 to $3,860,050.00 by amending the Articles of Incorporation so as to change the Corporation's 253,815 outstanding Common Shares without par value into Common Shares of the par value of $10.00 each, crediting to the surplus account of the Corporation, $1,151,136.05, which is the excess of assets resulting from said reduction of stated capital and changing 146,185 unissued Common Shares of the Corporation without par value into 146,185 Common Shares of the par value of $10.00 each" (19-20).

But this was not permissible under the Ohio statute.

The effect of the proposed reduction of the company's stated capital from $5,001,186.05 to $3,860,050 and the change of the company's outstanding common shares without par value into common shares with the par value of

$10 each, and the crediting to the company's surplus account of $1,151,136.05, which is the excess of assets resulting from such reduction of capital and change in the common stock, would be (20)

(a) To take away that $1,151,136.05, capital of the company, which otherwise, in the event of liquidation or dissolution of the company, would safeguard the preferred stock (20).

(b) To take away that $1,151,136.05, capital of the company, which otherwise would be subject only to diminution by losses in business operations (20).

(c) To deprive the preferred stockholders of the company of the benefits from the earning power of that $1,151,136.05 (20).

(d) To deprive the preferred stockholders of the right to rely upon that $1,151,136.05 as capital of the company safeguarding the preferred stockholders (20).

(e) To make that $1,151,136.05 available for cash payment of the preferred arrears and then pay dividends on the common stock, at loss, injury and expense of the preferred stockholders (20-22).

(f) To impair the contract of the preferred stockholders with the company and to take property of the preferred stockholders without due process of law (21).

(g) Under the guise of a reduction of capital and change in the common shares would divest the preferred stockholders of their present vested and permanent interest in the corporation, including the right to common stock for the unpaid dividend arrears on the preferred stock (21).

POINT I

The decisions below, holding it necessary for the Court, in a single action, to acquire jurisdiction over a majority of all of the directors of a corporation, in order to exercise its jurisdiction over the directors of whom the Court acquired jurisdiction, nullified Section 50, Judicial Code (28 U. S. C. A. 111), and judicially repealed the amendment to Section 51, Judicial Code (28 U. S. C. A. 112 as amended), which provides that where directors reside in different states, a stockholder is not limited to a single action, but may bring as many actions as required, so that the venue of them may be proper, in order to obtain complete relief.

Not only do the decisions below deprive the petitioner of a forum, because the directors are citizen residents of several states so that there is no tribunal with jurisdiction over a majority of all of the directors in a single suit, but, if allowed to stand, the decisions would be a precedent for derelict directors to scatter their citizenship and residence and thus commit breaches of trust with immunity.

There are four directors before the Court, to wit: Gracely, Strelitz, Rubenstein and Montrose. Under the Ohio Corporation Act [1] three of these four directors may effectively declare dividends.[2] If Pell and Hewitt (2, 15,

[1] The Ohio General Corporation Act provides, Section 8623-58:

"QUORUM. Unless the articles or regulations shall otherwise provide, a majority of the board of directors shall be necessary to constitute a quorum for the transaction of business. The act of a majority of directors present at a meeting at which a quorum is present shall be the act of the board of directors unless a great number is required by this act (G. C. Sec. 8623-1 to 8623-138) or the articles or regulations."

[2] Five directors constitute a quorum. Three directors can declare dividends.

16), directors of this Ohio corporation, waive the venue privilege of suit at their residence, then there would be six directors before the Court. This would render effective a decree of the Court below by a majority of all the directors.

Gracely, Montrose and *Strelitz* are citizen residents of Marion, Ohio. *Rubenstein* is a citizen resident of Massachusetts. He waived his personal privilege of venue.

There is no tribunal with personal jurisdiction over a majority of all directors of this Ohio corporation.

Section 50 of the Judicial Code (28 U. S. C. A. 111)[3] makes provision for enforcing a cause of action which exists against several persons, although one of them is neither an inhabitant of nor found in the district in which suit is brought and does not voluntarily appear. It does so, by permitting the Court to entertain jurisdiction, without prejudice to the party not regularly served nor voluntarily appearing (*Camp* v. *Gress*, 250 U. S. 308 at 313).

The 1936 amendment to the Judicial Code (28 U. S. C. A. 112),[4] treating with stockholders' derivative suits against

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[3] Page 8, *supra*, for text.

In *Shields* v. *Barrow*, 17 Howard (U. S.) 130, 139, Mr. Justice Curtis said:

> "if the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach * * * as if such other party be a resident of another state * * * ought not to prevent a decree on the merits."

"Equity will never suffer a wrong without a remedy." "Every just order or rule known to Equity Courts was born of some emergency, to meet some new conditions, and was, therefore, in its time without a precedent" (*Toledo, etc., Ry.* v. *Penn. Co.* (C. C. Ohio), 54 Fed. 746, 751). The rule is well established that where a duty exists, equity will provide a remedy for its violation (*Schneider* v. *Schneider* (App. D. C.), 141 Fed. (2) 542, 544; *Feist* v. *Young*, 7 Cir., 138 Fed. (2) 972, 974; *Grasselli* v. *Aetna*, 2 Cir., 252 Fed. 456).

[4] Page 8, *supra*, for text.

directors, provides "that suit * * * may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation * * *." In commenting on that legislation Prof. Moore says: "If the defendant directors reside in States 2 and 3, the plaintiff-shareholder may bring two actions: one in State 2, and another in State 3, so that the venue as to them will be proper" (2 *Moore, Federal Practice*, p. 2141, Note 27). That is exactly what the Courts below refused.

> "The rule established by the authorities * * * illustrates the diligence with which Courts of Equity will seek a way to the merits of a controversy in the absence of interested parties that cannot be brought in * * *" (*Bourdieu* v. *Pacific Western Oil*, 299 U. S. 65, 70).

The 1936 amendment was designed to give to the Federal Courts jurisdiction for effective corrective action against individuals for their conduct as directors of corporations. The very purpose of this legislation is defeated by the decisions below.

The Courts below are silent with respect to this legislation.

The Circuit Court held Section 50 (28 U. S. C. A. 111) inapplicable, stating: "That section applies to proper or necessary parties" (35). If one director is an indispensable party to an action against a director-defendant properly before the Court, then what did Congress intend by the amendment to Section 51 (28 U. S. C. A. 112 as amended) concerning which the Circuit Court is silent? The legislation clearly indicates the Circuit Court's error.

A fundamental error of the Circuit Court is its decision that directors' dividend responsibility is "joint" and not "joint and several" (36). The Circuit Court does not cite any supporting authority. We are dealing with an Ohio corporation.

In Ohio the directors' dividend responsibility is joint and several.[5] Therefore in Ohio a separable controversy exists as to each director with respect to his dividend conduct (*Ammond* v. *Penn. R. R.* (C. C. A. 6), 125 Fed. (2) 747, 749). Where, as here, "the liability of a director is several as well as joint, the authorities generally hold that it is not necessary to join all the directors (*Sigwald* v. *City Bank* (S. C.), 64 S. E. 398, 400; to the same effect see *Fish* v. *White* (Iowa), 175 N. W. 748).

A suit against a director to compel him to vote for declaration of a dividend is an action for breach of trust as a director (11 *Fletcher, Cyc. Corp.*, Perm. Ed., Sec. 5623). A suit to compel directors to declare dividends is derivative of the corporation (*Lydia Pinkham* v. *Gove* (1939, Mass.), 20 N. E. (2) 482, 489; *Maeder* v. *Buffalo Bill's Wild West,* 132 Fed. 280, 284).

Where a suit for breach of trust is brought against one director, the remaining directors are neither indispensable nor proper parties, for the controversy against each is separate (2 *Moore, Federal Practice,* p. 2146, citing cases).

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[5] Ohio General Corporation Act, Section 8623—123(b):

"UNLAWFUL DIVIDENDS; PENALTY.

* * * * * *

In case of any wilful or negligent violations of the provisions of this section, the directors, under whose administration the same shall have happened (except those who shall dissent as hereinafter provided), shall be jointly and severally liable to the corporation for the full amount of any such unauthorized dividend or distribution with interest at the rate of six per centum per annum until the same shall be paid.

* * * * * *

Any director against whom a claim shall be asserted by or on behalf of a corporation under or pursuant to this section, or who shall be held liable under or pursuant to this section, shall be entitled to contribution from other directors who are liable, according to the number of such directors, and any and all directors against whom a claim shall be asserted under or pursuant to this section or who shall be held liable, shall have a right of contribution against the shareholders who knowingly accepted or received any dividend or distribution not authorized to be made, and such shareholders shall contribute in proportion to the amounts received by them respectively."

See also:

Kern v. *Coffin* (C. C. A. 5), 203 Fed. 238, 241.

Consolidated Textile v. *Dickey* (C. C. A. 5), 269 Fed. 942, reversed the District Court (266 Fed. 587), which had held that all of the voting trustees were indispensable parties to relief for "an injunction to prevent the voting of the stock * * * by a majority of the voting trustees, in whom such right to vote is given * * * to be exercised by a majority" (269 Fed. at 945). The successful plaintiff-appellant argued that the non-resident defendant voting trustee "Jefferson is not an indispensable party" (269 Fed. at 944). The Circuit Court said (p. 945):

> "It is evident that the injunction prayed for against the appelles other than Jefferson would not deprive him of any right which he can exercise under said voting trust agreement."

It did not rest its decision on the number of directors against whom it could grant relief, though, in fact, a majority of the trustees (not directors) were parties to the suit. It said (p. 946):

> "If the suit cannot be maintained in Georgia, it cannot be in any state or federal court. The result would be that appellant would have no tribunal * * *.
> The decree dismissing the bill is reversed."

See also *Krouse* v. *Brevard*, 4 Cir., 249 Fed. 538.

In *Anderson* v. *Abbott*, 321 U. S. 349, the Court said:

> "If the judicial power is helpless * * * then indeed it has become a handy implement of high finance" (p. 366).

> "Once the purpose of the scheme is clear * * * we would indeed forsake a great tradition to say that we are helpless to fashion the instruments for appropriate relief" (p. 367).

It is idle to argue that petitioner has gone out of her way by the normal procedure of suing in Ohio for dividends of an Ohio corporation doing business at Marion, Ohio. Were such a suit begun in any other State Court (1) that Court would not have jurisdiction of a non-resident Ohio corporation which must be joined as a defendant and (2) that Court would not interfere with the internal affairs of an Ohio corporation (*forum non convenions*). The 1936 amendment to the Judicial Code conferring jurisdiction over a non-resident corporation applies only in the Federal Court. The Federal Court at New York, however, would not have diversity jurisdiction in an action against the New York directors brought by the plaintiff who is a citizen resident of New York.

The District Court of the United States for the Northern District of Ohio, Western Division—the Court below—is the Court to grant the relief sought by plaintiff-petitioner.

The District Court's statement "that were it to hear the case on the merits, and were it to conclude that a dividend ought to be paid" (23), is a clear acknowledgment that the complaint states a claim for dividends under the Ohio law.

Respondents' motions admit (6):

> "19. * * * there have been and still are surplus profits, sufficient to pay said unpaid accumulated dividends, and, an excess of the aggregate of the company's assets less the statutory deductions required over the aggregate of the company's liabilities plus stated capital to pay dividends on the Preferred stock; but the company's directors unreasonably and wrongfully refuse to pay dividends on the preferred stock."

Were petitioner a common stockholder she would be entitled to a judicial direction for the declaration of dividends in cash.

> *Arbuckle* v. *Woolson Spice Co.*, 11 O. C. D. 726.
> *Ohio General Corporation Act*, Sec. 8623-38.

Cannon v. *Wiscassett Mills* (1928), 195 N. C. 119, 141 S. E. 345.

Keough v. *St. Paul Milk* (Minn., 1939), 285 N. W. 809.

The stockholder's right to dividends is fixed and the "discretion of the directors is correspondingly limited, and the reasons that have made the courts reluctant to order the declaration of dividends lose their force" (*Lydia E. Pinkham* v. *Gove* (1939), 300 Mass. 1, 20 N. E. (2) 482 at 490, citing cases).

Petitioner, as a preferred stockholder, is in a much stronger position than a common shareholder, to insist that the earnings be applied to the preferred stock dividends.

> "It has been held that, as to dividends, common and preferred stockholders occupy a different status with respect to securing the aid of a court of equity in the enforcement of a declaration of dividends, and that a court of equity may aid a holder of preferred stock where it would not aid a holder of common" (12 *Fletcher, Cyc. Corporations,* Perm. Ed., p. 182, Sec. 5446).[6]
>
> "The distinction between common stockholders and preferred stockholders may be said to be that the common stockholder is an owner of the enterprise in the proportion that his stock bears to the entire stock * * *. A preferred stockholder is a mode by which a corporation obtains funds for an enterprise without borrowing money or contracting a debt, the stockholder being preferred as to principal and interest and having no voice in the management" (*Elko* v. *Commissioner* (C. C. A. 9), 50 Fed. (2) 595, 596).

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[6] "Generally, the question of declaring a dividend is entrusted to the sound discretion of directors; and, as to common stock, such discretion will not be interfered with by a court of equity in the absence of bad faith or arbitrary or unjustifiable conduct. But different rules apply with respect to the rights of the holders of preferred stock to invoke the aid of a court to order the declaration and payment of dividends on their stock" (*Cratty* v. *Peoria Law Library Assn.*, 219 Ill. 516; 76 N. E. 707, 708). See also *Patterson* v. *Durham Hosiery Mills* (1939), 214 N. C. 806; 200 S. E. 906.

"Therefore, so far as the face value of the preferred stock is concerned, it is in the nature of a debt against the corporation, and the interest thereon becomes a debt as soon as it can be shown that there were profits wherewith to pay it, and becomes a lien prior to the holders of the common stock upon such earnings, if there were such, for the amount of the dividend and can be followed wherever invested by the company" (*Storrow* v. *Texas* (C. C. A. 5), 87 Fed. 612 at 617).

While it is true that a holder of cumulative preferred stock is not a creditor of the corporation, so as to entitle him to bring suit at law against the Corporation for dividends in arrears, but not declared (American Steel Foundry v. Lazear, 124 C. C. A. 231, 204 Fed. 204), yet, considering the relations of the stockholders inter sese * * * there is every reason to hold as soon as the agreed dividend which the preferred stockholder is to receive is matured by time, a right to its ultimate payment as against those who have agreed to its payment becomes a vested right. It is a present property interest" (*General Inv.* v. *American Hide,* 98 N. J. Eq. 326, 129 Atl. 244, 249).

This is not a case where preferred stockholders, like common stockholders, may replace the company's directors. Nominally the preferred stockholders may select 40% of the directors—which leaves the control with the common. Actually, all the directors represent the common stock.

When, as here, "the right to dividend is clear and there are funds from which it can properly be made, a Court of Equity will interfere to compel a company to declare it. Directors are not allowed to use their power illegally, wantonly or oppressively" (*O'Neall* v. *O'Neall,* 25 N. E. (2) 656 at 659).

Had dividends from these earnings been distributed to the preferred stockholders, as required by the preferred stock contract, then the company's directors would have been unable to carry out their program to benefit the common stock.

No clearer case of bad faith could exist. No stronger case of oppression could be shown.

POINT II

Since Grant is neither an indispensable nor a necessary party, naming Grant as a defendant did not deprive the Federal Court of diversity jurisdiction over the parties who are properly before the Court.

Salem Trust v. *Manufacturers Trust,* 264 U. S. 182.
Geer v. *Mathieson,* 190 U. S. 428, 436.
Walden v. *Skinner,* 101 U. S. 577.

The Circuit Court said (Rec. p. 31):

> "Although the District Court based its ruling on the second and third grounds stated in the motion to dismiss, it appears that the ruling should be sustained also on the first ground stated in the motion, namely, lack of diversity of citizenship."

The motion to dismiss was made by the respondents Gracely, Montrose, Strelitz and the corporation (13, 22). They are the only ones who were served (22). They are all citizen residents of Ohio (2) and the petitioner is a citizen resident of New York.

As said by this Court in *Walden* v. *Skinner,* 101 U. S. 577, 25 L. Ed. 963, 967, in this case:

> "Jurisdiction between the complainant and the respondent is unquestionable."

The Circuit Court continued (Rec. p. 32):

> "The complaint alleged that the defendant Grant was a resident of the State of Ohio, which furnished diversity of citizenship between him and the plaintiff. This allegation was put in issue by the motion to dismiss and the affidavit filed by the defendants-appellees that Grant was a resident of New York. Upon the issue so raised the burden of proof rested upon the appellant which was not met."

Grant did not join the motion (33). The Circuit Court acknowledged Grant was not before the Court (33). If "Grant was at least a proper party to this action, regardless of whether or not he was an indispensable party" (33), a basic error in this conclusion of the Circuit Court is its decision that though Grant "is not an indispensable party—his joinder as a defendant by the plaintiff destroys the necessary diversity of citizenship" (33).

The law is well settled that in ascertaining whether a controversy is wholly between citizens of different states, the Court "will disregard the citizenship of all parties who are not indispensable" (citing cases). (Lindley, D. J., who constantly sits in C. C. A. 7—*Ford* v. *Atkins,* 39 Fed. Supp. 472.) This Court did not hold otherwise in *Indianapolis* v. *Chase,* 314 U. S. 63.

The Circuit Court disregarded the complaint which alleges with respect to Grant:

> "47. Plaintiff does not seek personal judgment against the company's directors over whom the Court cannot exercise jurisdiction * * *.
>
> Wherefore, plaintiff demands judgment.
>
> 1. That the directors defendants—excepting those directors who are citizen residents of New York, declare * * *" (11).

The purpose of such allegations was to protect the jurisdiction of the Court to proceed to trial and adjudication of the suit between the parties who are properly before the Court, if it should turn out that someone who is a defendant in name only is a citizen resident of New York.

Galdi v. *Jones,* 2 Cir. 141 Fed. (2d) 984, upheld federal diversity jurisdiction in the Federal Court of Connecticut against a Connecticut corporation and Connecticut directors, where the co-defendant director Smythe and the plaintiffs were New York citizens and residents. That complaint alleged that those plaintiffs did "not seek personal judgment against Smythe * * * by reason of the matters

herein set forth" (Rec. fol. 80). There as here "They joined him as a defendant, then failed to serve him" (Defendants-Appellees' Brief to 2nd Cir., p. 9).

None of the cases cited by the Circuit Court are to the contrary. Its decision presents a conflict with the Second Circuit in *Galdi* v. *Jones*.

POINT III

The second claim states a claim against the corporation respondent, for dividends legally payable in common stock, in an amount equal to the arrears on the outstanding preferred stock.

Considering the directors as parties, this Court, in *Geer* v. *Mathieson*, 190 U. S. 428, said, at page 432:

> "A suit may consistently with rules of pleading, embrace several distinct controversies." [7]

The Circuit Court says that this claim is "obviously an afterthought" (37). It is set forth in the complaint. Petitioner argued the sufficiency of this claim both to the Circuit and to the District Court. Respondents stood mute.

---

[7] It matters not that the complaint's prayer for relief does not ask such a judgment at law against the corporation (*Galdi* v. *Jones*, 2 Cir., 141 Fed. (2) 984; *Materesse* v. *Moore-McCormack*, 2 Cir., 158 Fed. (2) 631, 633).

In *Kansas City, St. L. & C. R. Co.* v. *Alton R. Co.*, 7 Cir. (1941), 124 Fed. (2) 780, the unanimous Court said, at 783: "We do not think that the prayer on this part of the complaint is for equitable relief. Even if it were, the prayer does not control. The prayer may be looked to, to help determine the relief to which the appellant is entitled, but it is not controlling."

"Rule 54 (c) *Demand for Judgment.*

* * * * * *

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

They contended that they did not challenge the sufficiency of this claim (compare their motion to dismiss for failure to state a claim, Rec. p. 13). It is idle therefore to say that this claim is an afterthought.

Respondents' motion to dismiss admits the truth of the following allegations in the complaint (Rec. p. 6):

> "19. During said periods, there have been and still are surplus profits, sufficient to pay said unpaid accumulated dividends, and, an excess of the aggregate of the company's assets less the statutory deductions required over the aggregate of the company's liabilities plus stated capital to pay dividends on the Preferred Stock; but the company's directors unreasonably and wrongfully refuse to pay dividends on the preferred stock.
>
> 20. The company's directors, including director defendants, devised a scheme and artifice to put the outstanding common stock on a dividend basis for the benefit of such common stockholders who elected 60% of the director defendants.
>
> 21. In pursuance of such scheme and artifice, the company's directors, including the director defendants, caused (1) the company's outstanding 6% Bond Issue to be retired, before maturity, at a premium about April 1, 1946, (2) the company's charter to be amended about April 3, 1946, by increasing the company's common stock from 100,000 shares to 400,000 shares of common stock, (3) one half of the outstanding 7% Preferred Stock to be exchanged into common stock by June 14, 1946, (4) in October, 1946, an amendment to the charter to be proposed to create a prior preferred stock and thus subordinate the outstanding Preferred Stock owned by such as plaintiff who had refused to convert their preferred into common.
>
> * * * * * *
>
> 24. Elmer G. Diefenbach, as Chairman of the Company's directors, on October 2, 1946, addressed a communication
>
> 'To the Preferred and Common Shareholders of Marion Power Shovel Company—
>
> The first step in the plans for the simplification of the capital structure of your Company was suc-

cessfully concluded on June 14, 1946, at which time, one half of the 7% Preferred Stock was exchanged and retired. The present management of Marion Power Shovel Company has worked with all possible diligence to put the companies' affairs in such state that you, the owners of the business, could receive a return on your investment at the earliest possible time consistent with a conservative financialy policy.'

25. The foregoing setup was part of a plan to benefit the outstanding common stock and to put the common stock on a dividend basis, which could not lawfully be done, so long as dividends remain unpaid on the Preferred Stock.

* * * * * * *

28. The Company's directors, including the directors defendants, own, control, or are beneficially interested direct or indirectly in the common stock of the corporation, which benefits from elimination, without payment, of the accrued dividends on the preferred stock."

Accrued dividends must be paid on retirement of preferred stock. The retirement of the 13,219½ shares of preferred stock, carried with it the payment of the dividend arrears and implied a valid declaration of the arrears payable in common stock.

Sterling v. *Watson,* 241 Pa. 105, 88 Atl. 297.

The retirement of these 13,219½ shares imports taking up the holders' claims for dividend arrears as well. The corporation took these shares with all their rights. In doing so the corporation satisfied their claim for dividend arrears but in a compromised amount.

No matter how large or how small, whether in full or in compromise, no payment in any form could have been made on account of arrears without a declaration of dividends. In authorizing tl e compromise payment to the holders of the 13,219½ shares of preferred the corporation declared a dividend for the accrued and unpaid dividends on the preferred stock.

"No particular form or phraseology is essential to declare a dividend" (11 *Fletcher, Cyc. Corporation,* Perm. Ed., p. 874, Sec. 5350). "It is settled that a dividend may be declared without formal declaration of the same, and that where declared, the word 'dividend' need not be used in connection with the action in regard thereto" (*Brown* v. *Luce* (1936), 231 Mo. App. 269, 96 S. W. (2d) 1098, 1100).

When the corporation took up the claim for dividend arrears on the 13,219½ shares which it retired, it became obligated to take up the dividend arrears on the 17,788½ shares left outstanding.

A corporation cannot discriminate between shareholders (*Sutton* v. *Stacey Mfg. Co.* (1915), 17 Ohio N. P. (N. S.) 497).

The argument that dividends payable in common stock to holders of common stock are to be treated as capital and not as earned income has no vitality to dividends payable in common stock to the holders of preferred stock. A common shareholder has an aliquot or pro rata interest in the net assets of a corporation. If the corporation loses money he loses in proportion to his holdings, even though the preferred shareholder does not share in the loss. The value of a common share, at any time, is found by dividing the number of common shares outstanding into the value of the net assets, increasing in value as the net assets increase. The value of a preferred share is fixed and does not increase as the net assets increase.

There is no prohibition against preferred stock dividends payable in common stock. On the contrary, the Ohio Corporation Act [8] expressly provides that dividends

[8] Section 8623-38:

"DIVIDENDS. (a) A corporation may declare dividends payable in cash, shares, or other property out of the excess of the aggregate of its assets less the deductions hereinafter required over the aggregate of its liabilities plus stated capital.

* * * * * *

(c) No corporation shall declare or pay a dividend in cash or other property when there is reasonable ground for believ-

may be paid in common stock, and that, unless otherwise stated, paid dividends are considered to be a distribution of earned income.

The declaration of the preferred stock dividend arrears payable in common stock cannot be recalled.

> *Taylor* v. *Axton Fisher Tobacco Co.* (Ky.), 173 S. W. (2) 377.
>
> *Mitchell* v. *Wheel Co.*, 40 Ohio N. P. (N. S.) 609, 17 O. D. (N. P.) 483, 31 O. D. 420, affirmed by Court of Appeals.

The corporation cannot defend or refuse to pay in full the dividend arrears on the remaining 17,788½ shares of preferred on the alleged ground that such dividend arrears have not been earned.

> *Segerstrom* v. *Holland Piano,* 160 Minn. 95, 199 N. W. 897.
>
> *Ball* v. *Peper Colton Press,* 140 Mo. App. 26, 121 S. W. 798.

"These unpaid dividends (before declaration) are treated as if they were in the nature of a debt" (*Johnson* v. *Lamprecht,* 133 Ohio St. 567, 572, 573). Defendants admit these dividend arrears have been earned (6).

> "The preferential rights of the plaintiffs to the accrued unpaid dividends were vested and absolute as between the parties and enforceable in a court of law until the corporation, a party to the contract, undertook to abolish such rights of the preferred shareholders to the gain and profit of the common shareholders. It was never the intention of the legislature that corporate management might secure capi-

---

ing that it is unable or, by the payment of the dividends, may be rendered unable to satisfy its obligations and liabilities.

(d) Whenever a dividend is paid, in whole or in part, out of other than earned excess of assets appearing on the books of the corporation at the time of the declaration of such dividend, the shareholders receiving such dividend shall be notified as to its source."

tal upon the representation that the investment was to be safeguarded * * * and then after the investment has been made * * * the corporate management might repudiate any part of the contract * * * " (*Wheatley* v. *Root,* 33 Ohio Law Rep. 464, 470.

Respondents' program aimed at retirement of the outstanding preferred and a compromise of the dividend arrears is, in fact, compulsory and, in law, illegal.

"Attempts * * * to effect a compulsory exchange of stock * * * or to cancel unpaid accumulated dividends have been enjoined" (*Wheatley* v. *Root,* 33 Ohio L. R. 464 at 472).

Respondents' entire course and conduct is an attempt to effect a compulsory exchange of stock and to cancel unpaid dividends. Realists would call it compulsory and not optional or voluntary.

While petitioner is entitled to cash dividends (*Johnson* v. *Bradley Knitting Mills* (Wisconsin, 1938), 280 N. W. 688), she and all other preferred shareholders seek a judgment against the corporation for the dividend arrears, payable in common shares, in an amount which will fully pay those arrears.[9]

It is a far cry from the realistic fact, for the Circuit Court to say that the dividend arrears were not paid to those holders of the preferred who compromised the amount of the arrears and that we are dealing with an ordinary offer of exchange of preferred stock for common stock.

The complaint and supplemental complaint allege a course charted by respondents to bludgeon petitioner and similarly situated preferred stockholders, all designed to

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[9] When the October, 1946, proposal to preferred shareholders is evaluated, it is not surprising that it was rejected by the preferred shareholders (Comp., pars. 38-40) (11). As at October 2, 1946 (11).

Preferred unpaid dividends per share	$112.00	$112.00
Value 6 shares Common—Market 10½	63.00	
Value 8 shares Common—Market 10½		84.00
Loss each share preferred 6 sh. basis	$ 49.00	
Loss each share preferred 8 sh. basis		$ 28.00

put an end to the preferred stock and to destroy the vested right in unpaid preferred dividend arrears.

Three assaults were made on petitioner and similarly situated preferred shareholders, all for the benefit of the common stockholders.[10] *First:* June 14, 1946, dividends in common stock were paid to the holders of 13,219½ shares of preferred, who exchanged their preferred stock with the accumulated arrears for common stock. Nothing was paid to the holders of the remaining 17,788½ shares of preferred. This exchange increased the common stock value about $10.90 per share of common.[11] *Second:* November, 1946, the preferred shareholders were advised that the corporate charter would be amended, a prior preferred would be created, and of a plan for inadequate payment of the dividend arrears. This failed (8-10). *Third:* 1947, the shareholders were advised of the annual meeting which would consider a restatement of the corporate capital. Though this may not be considered at an annual meeting, the effect of the capital restatement would be that the preferred stock dividend arrears would be paid in cash out of the security for the preferred stock (19-20) so that in the future the common stock could be put on a dividend basis.

Respondents' communications to and treatment of the preferred stockholders reminds us of Lewis Carroll's

> "I sent a message to the fish:
> I told them 'This is what I wish.'
> The poor little fishes of the sea,
> They sent an answer back to me.
> The little fishes' answer was
> 'We cannot do it, Sir, because——'
> I sent to them again to say,
> 'It will be better to obey.'
> The poor little fishes answered with a grin
> 'Why, what a temper you are in.'
> I told them once, I told them twice,
> They would not listen to my advice."

---

[10] There is a conflict of interest between the preferred and the common. The directors hold their places through the graces of the common stockholders.

[11] Standard & Poor Corp. Rec. of 1946, p. 30.

POINT IV

Petitioner should have leave to serve a supplemental complaint.

Petitioner's supplemental complaint states a claim against the defendant corporation for relief against the material charter alteration of preferential rights of plaintiff as a preferred stockholder (pp. 12, 13, *supra*).

After petitioner's complaint had been filed with the District Court, respondent corporation gave notice of an annual meeting to consider a charter amendment restating the capital.

Thereupon petitioner applied for leave to serve her supplemental complaint.

This supplemental complaint challenges the restatement of capital (18-22).

This capital restatement injures and alters the rights of the outstanding 17,788½ shares of preferred stock of petitioner and these similarly situated and is unlawful (*In re Kinney*, 279 N. Y. 423, 18 N. E. (2) 645).

Breslav v. *N. Y. & Queens Electric*, 249 App. Div. 181, aff'd 273 N. Y. 593, 7 N. E. (2) 708, restrained a charter amendment affecting a preferred stockholder's right.

If, as respondents say, objecting shareholders do not have the right to dissent and appraisal, then their only remedy is to invalidate the restatement of capital.

Furthermore, the Ohio General Corporation Act is so worded (a) as to negative the authority of the stockholders at an annual statutory meeting to consider a charter amendment, and (b) as to require a special meeting of the shareholders to amend the articles of incorporation in order to restate the corporation's capital.

The Ohio General Corporation Act provides:

> "Sec. 8623-42. Annual Meeting.
>
> Unless otherwise provided in the articles or regulations an annual meeting of shareholders, for the elec-

tion of directors and the consideration of the reports to be laid before such meeting, shall be held on the first Monday of April in each year. When the annual meeting is not held or directors are not elected thereat, they may be elected at a special meeting called and held for that purpose."

Nothing could more clearly state the business to be transacted at the annual meeting (19 *Fletcher, Corp.*, Perm. Ed., Sec. 9025, p. 207; 2 *Fletcher, Corp. Forms*, 3rd Ed., Sec. 1860, p. 364).

A capital restatement at the statutory annual meeting in April, 1947, is unauthorized, illegal and invalid.

A special meeting to convene at the conclusion of the statutory meeting might have been called to consider the recapitalization by charter amendment. But that would have required separate proxies. Judging from the preferred stockholders' previous refusal of proxies for a charter amendment (9, 10), they might again refuse proxies for a charter amendment.

The purpose of the diversity jurisdicton is to afford this non-resident plaintiff an opportunity to present this supplemental claim against this Ohio corporation "in the federal rather than in the state courts".

Meredith v. *Winter Haven*, 320 U. S. 228, at 234.

On this supplemental claim petitioner could institute a separate action against the corporation respondent. But the Federal Rules of Federal Procedure aim to determine all controversies in a single litigation.

Since this claim arose after the filing of this suit, and while respondents' motions were sub judicia, petitioner applied below under Rule 15(d), F. R. C. P.,[12] for leave to

[12] "Rule 15. (d) *Supplemental Pleadings.*

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor."

file the supplemental complaint and for an order directing the respondent corporation to answer (*Homewood* v. *Standard Power & Light Co.*, 55 Fed. Supp. 100).

Were this claim the basis of a separate suit in the Court below, consolidation of both actions would follow under Rule 42(a), F. R. C. P.[13]

> "Litigation is the pursuit of practical ends, not a game of chess."
>
> *Indianapolis* v. *Chase*, 314 U. S. 67, 69.

CONCLUSION

It is respectfully submitted that a writ should be granted.

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[13] "Rule 42. (a) *Consolidation.*

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 665.

LUCILLE SCHUCKMAN,
Petitioner,

v.

LAWRENCE J. RUBENSTEIN, HARVEY T. GRACELY, STANLEY R. GRANT, MAYNARD E. MONTROSE, J. MALCOLM STRELITZ, OGDEN B. HEWITT, HAMILTON PELL and MARION POWER SHOVEL COMPANY,
Respondents.

BRIEF OF RESPONDENTS GRACELY, MONTROSE, STRELITZ AND MARION POWER SHOVEL COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

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SUPPLEMENTARY STATEMENT OF THE CASE.

The petitioner's statement of the case is so filled with unwarranted characterizations of her complaint that we must restate the issues completely.

The questions involved in this case are these:

1. Must the United States District Court in Ohio entertain an action to compel the declaration of dividends on stock of an Ohio corporation where only one-fourth of the directors have been subjected to the jurisdiction of the Court?

2. Jurisdiction being based on diversity of citizenship, was the dismissal of the complaint properly affirmed on the alternative ground that a defendant, who was a proper but

* We do not understand how petitioner arrived at the list of respondents included in her petition. She has omitted some of the defendants who were not served, including Grant who is a resident of the same state as the petitioner, but has included Rubenstein who was not served.

not indispensable party, was a resident of the same state as the plaintiff?

3. Should the plaintiff, a preferred stockholder, in an action to compel the declaration of a dividend, have been permitted to file a supplemental complaint for an injunction against a reduction of stated capital of the common stock?

There is no issue in this case as to the payment of a dividend already declared. As stated by the Circuit Court of Appeals, this claim of the petitioner is an afterthought (R. 37). The complaint prayed that the defendants be required "*to declare*" a dividend (R. 11).

The petitioner's statement of the facts does not include the status and citizenship of all the persons named as parties. The plaintiff is a resident of New York. Marion Power Shovel Company is an Ohio corporation. The individuals named as defendants were alleged to be directors of the defendant corporation. Hewitt and Pell are residents of New Jersey and Connecticut, respectively (R. 2). Rubenstein is a resident of Massachusetts (R. 15). Grant is a resident of New York (R. 16), although alleged in the complaint to be a resident of Ohio (R. 2). The other three defendants, Gracely, Montrose and Strelitz are residents of Ohio. Two other directors, Diefenbach and Terry, are residents of New York and were not made parties (R. 2).

Only three individual defendants were served, Gracely, Montrose and Strelitz, and of these three Montrose had resigned as a director before he knew of the pendency of this action (R. 14-15) or was served with summons (R. 22). The petitioner's unsupported claim that Rubenstein waived his personal privilege of venue (P. Br. 15) is explained and disposed of in the opinion below (R. 33) and requires no further discussion in this brief.

Thus, at the time defendants' motion to dismiss was made, only two directors of a board of eight had been

served with summons and one of the parties defendant not served was a resident of the same state as the plaintiff. The plaintiff did not at any time dismiss the defendant Grant whose joinder as a party destroyed the diversity of citizenship.

ARGUMENT.

1. No federal question of jurisdiction or procedure is raised by the holding that a majority of the directors are indispensable parties to an action to compel the declaration of dividends.

The decision of the two lower courts that this action cannot proceed in the absence of a majority of the Board of Directors is fundamentally a question of corporation law, not federal jurisdiction or procedure. Sections 50 and 51 of the Judicial Code, 28 U. S. C. A. Sections 111, 112, are not in controversy. There is no doubt that if a majority of the directors are indispensable parties the action cannot proceed without them, notwithstanding the provisions of Section 50 of the Judicial Code; *Swan Land and Cattle Co. v. Frank*, 148 U. S. 603 at 611, and cases there cited. There can also be no doubt that if a majority of the directors are indispensable parties, the petitioner is not aided by Section 51 of the Judicial Code, 28 U. S. C. A., as amended in 1936. That amendment has to do with obtaining jurisdiction of the corporation in a stockholder's suit in the district where the corporation could have obtained jurisdiction of the necessary directors. *Koster v. (American) Lumbermans Mutual Casualty Co.*, 330 U. S. 518 at page 522, footnote 2.

The Circuit Court of Appeals, after a thorough study of the statutes of Ohio and the common law of Ohio and other states as to the discretion of a board of directors in declaring dividends and the great unwillingness of courts to interfere with that discretion, came to the conclusion that a majority of the directors are indispensable parties. The leading cases are:

Johnson v. Lamprecht, 133 O. S. 567;
Dodge v. Ford Motor Co., 204 Mich. 459;
Kales v. Woodworth, 32 Fed. (2) 37 (C.C.A. 6);
Tower Hill Connellsville Coke Co. of West Virginia v. Piedmont Coal Company, 33 Fed. (2) 703 (C.C.A. 4).

The court in this aspect of the case decided a question of Ohio corporation law and there is no occasion for this Court to review its decision.

The petitioner states the question as though she had been deprived of any forum in which to sue (P. Br. 5). This is incorrect. The decision deprives her of a *federal* forum in which to sue. The language of this Court in *Indianapolis v. Chase National Bank*, 314 U. S. 63 at page 76, discussing a similar ruling, is most apt:

> "This is not a sacrifice of justice to technicality. For the question here is not whether Chase and Indianapolis Gas may pursue what they conceive to be just claims against the City, but whether they may pursue them in the federal courts in Indiana, rather than in its state courts. The fact that Chase prefers the adjudication of its claims by the federal court is certainly no reason why we should deny the plain facts of the controversy and yield to illusive artifices. Settled restrictions against bringing local disputes into the federal courts cannot thus be circumvented.
>
> "These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. See *Madisonville Traction Co. v. Mining Co.*, 196 U. S. 239, 255, and *Ex parte Schollenberger*, 96 U. S. 369, 377. The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state

courts,' in order to keep them free for their distinctive federal business * * *." (p. 76.)

In the Ohio state court the petitioner will not be embarrassed either by the non-residence of the respondents, who can be served when they attend meetings, nor by the residence of certain of the directors in New York, whose presence would destroy diversity of citizenship, Ohio General Code, Section 11,276.* She has in large part created the difficulties which thwart her in this action by electing to sue in the federal court.

2. There is no conflict between the decision in this case and the case of Galdi v. Jones.

Petitioner argues that there is a conflict between this case and *Galdi v. Jones*, 141 Fed. (2) 984 (C. C. A. 2). In that case a minority stockholders' suit was brought in the United States District Court in Connecticut by a resident of New York against the corporation's directors, one of whom was a resident of New York. There was a diversity of citizenship between all the other parties, except the New York director, Smythe, and he died pending appeal. The Circuit Court of Appeals said that the New York director was not an indispensable party and that dismissing him would not have prevented the District Court from proceeding. However, since he died pending appeal the question as to what disposition the Court of Appeals would make of the case if he were still a party was not before it. That question faced the Circuit Court of Appeals in the case at bar.

Admittedly the petitioner in this case could have dismissed Grant in the District Court and if the court had jurisdiction of a majority of the directors without him, it could have proceeded. The petitioner did not dismiss Grant. Therefore, as the case was presented to the Cir-

---

A transitory action may be brought against a non-resident " * * where such defendant is found * * *."

cuit Court of Appeals, there was a lack of diversity. The cases cited by the court below amply support its conclusion that in this situation the appellate court cannot itself dismiss the party whose presence destroys the diversity.*

Levering & Garrigues Company v. Morrin, 61 Fed. (2d) 115, C. C. A. 2nd;

Dollar S. S. Lines v. Merz, 68 Fed. (2) 594, C.C.A. 9th;

International Ladies' Garment Workers' Union v. Donnelly Garment Co., 121 Fed. (2) 561 (C. C. A. 8th);

Alderman v. Elgin, J. & E. Ry. Co., 125 Fed. (2d) 971, C. C. A. 7th;

Continental Insurance Company v. Rhoads, 119 U. S. 237;

Halsted v. Buster, 119 U. S. 341.

The decision of this Court with respect to the diversity of citizenship point is, therefore, entirely in harmony with *Galdi v. Jones*, and supported by an abundance of authorities in this Court and other Circuit Courts of Appeals. In any event, the jurisdictional ruling merely reinforced the holding that a majority of the directors are indispensable parties and did not control the disposition of this case either in the Circuit Court of Appeals or in the District Court.

3. The denial of leave to file a supplemental complaint raises no federal question of importance.

The supplemental complaint attacked the validity of the reduction of stated capital of the corporation, which was authorized at a stockholders' meeting held three months after the complaint was filed. There was no con-

* If the dismissal of the action were not required on other grounds (absence of indispensable parties), the dismissal of Grant might have been permitted in the District Court after remand. See *Levering & Garrigues Company v. Morrin, supra.*

nection between the two transactions. The District Court, in exercising its discretion not to permit this entirely unrelated transaction to be litigated in the same action as the dividend question, acted entirely within its powers. Furthermore, since the original complaint had to be dismissed there was no pleading for the second complaint to supplement. No new service of process was obtained on it. The denial of leave to file the supplemental complaint deprived no one of a substantial right or raised any question which it is desirable for this Court to decide.

CONCLUSION.

The controlling question in this case, whether a majority of the directors must be before the Court as defendants in an action to require the declaration of dividends, is one of Ohio corporation law and does not concern this Court. The decision of the Circuit Court of Appeals on diversity of citizenship is not in conflict with any other decision and does not dispose of the case. The ruling of the District Court on the supplemental complaint is inconsequential. The petition for certiorari should, therefore, be denied.

Respectfully submitted,

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